

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION**

UNITED STATES OF AMERICA)	
ex rel. K3 ANALYTICS, LLC,)	
)	Case No. _____
Plaintiff-Relator,)	<u>FILED UNDER SEAL</u>
)	
v.)	
)	
ACTION ENTERPRISE)	
HOLDINGS, LLC,)	
)	
Defendant.)	

COMPLAINT

1. Relator K3 Analytics, LLC (“Relator”) brings this action on behalf of itself and the United States of America against defendant Action Enterprise Holdings, LLC for violations of the federal False Claims Act, 31 U.S.C. §§ 3729 *et seq.*

2. This action seeks to recover funds that were loaned to Defendant through the federal Government’s Paycheck Protection Program (“PPP”) and forgiven by the Government as a result of false applications.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 31 U.S.C. § 3732(a) and 28 U.S.C. §§ 1331, 1345.

4. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and 31

U.S.C. § 3732(a), as the defendant resides or transacts business in this jurisdiction and violations of the False Claims Act described herein occurred in this district.

PARTIES

5. Defendant Action Enterprise Holdings, LLC (“Action Enterprise Holdings”) has a principal office address of 204 20th Street North, Birmingham, AL 35203. It also has an office at 735 N Water St, Milwaukee, WI 53202.

6. At all relevant times, Action Enterprise Holdings wholly owned Action Resources, LLC and, upon information and belief, Action Resources Gulf Coast, LLC.

7. At all relevant times, Action Resources, LLC wholly owned Action Environmental, LLC; Action Dedicated, LLC; and, upon information and belief, Action Dedicated II, LLC.

8. At all relevant times, Action Enterprise Holdings also owned 100% of ARI Logistics, LLC; 80% of ARI Logistics (PT), LLC; and, upon information and belief, it was the majority owner of ARI Logistics (PPM), LLC.

9. Another entity owned and controlled by Action Enterprise Holdings was Stone Trucking Company d/b/a Action Specialized.

10. Action Resources, LLC and Action Resources Gulf Coast, LLC (collectively, “Action Resources”) have a principal location of 40 County Road

517, Hanceville, AL 35077. From 2019 until June 2020, Philip DeSimone was its CEO. From June 2020 through the present, former general counsel Staci Pierce is its CEO.

11. ARI Logistics, LLC d/b/a Action Enterprise Logistics has a principal location of 40 County Road 517, Hanceville, AL 35077. ARI Logistics (PT), LLC has a principal location of 204 20th Street North, Birmingham, AL 35203. These two entities and ARI Logistics (PPM), LLC are collectively referred to herein as “ARI Logistics.”

12. As with Action Resources, DeSimone and then Pierce were ARI Logistics’ CEO.

13. Action Environmental, LLC (“Action Environmental”) has a principal address of 204 20th Street North, Birmingham, AL 35203.

14. Legacy AD, LLC d/b/a Action Dedicated LLC and Legacy AD II, LLC d/b/a Action Dedicated II LLC (collectively, “Action Dedicated”) have a principal address of 204 20th Street North, Birmingham, AL 35203. Their assets were sold in 2023.

15. Stone Trucking Company was acquired by Action Resources in 2014. In early 2020, it began to do business as Action Specialized. Its principal address was 3529 West 151st Street, Kiefer, OK 74041.

16. Upon information and belief, Stone Trucking Company consisted of multiple entities, potentially including but not limited to Stone Trucking,

LLC; Stone Trucking, Inc.; STI Trucking LLC; Stone Trucking Southwest, LLC; and David Stone Trucking Company.

17. Filings with the state of Texas indicate that STI Trucking Company was wholly owned by STI Acquisition Company, LLC; its registered agent was Action Resources, LLC; and its CEO was Philip Desimone. STI Acquisition Company LLC is a Delaware corporation, but its registered agent with the Secretary of State is a company called Joshua 1:8 LLC located at 40 County Road 517, Hanceville, AL 35077, the same address as Action Resources.

18. The entities listed above are hereinafter collectively referred to as the “Action Entities.”

19. Relator K3 Analytics LLC is a company that analyzes data to identify and investigate potential PPP fraud.

THE PAYCHECK PROTECTION PROGRAM

20. During the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”). Section 1102 of the CARES Act contains a program called the Paycheck Protection Program (“PPP”), a program administered by the U.S. Small Business Administration (“SBA”) to provide economic relief to small businesses nationwide adversely impacted by the coronavirus pandemic.

21. Section 1102 of the CARES Act temporarily permitted SBA to

guarantee 100% of the PPP loans. Section 1106 of the CARES Act provided for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP.

22. The CARES Act gives lenders delegated authority to process loan applications for PPP funding. SBA allowed lenders to rely on certifications of the borrowers in order to determine eligibility of the borrower and use of loan proceeds, and to rely on specified documents provided by the borrower to determine qualifying loan amount, and eligibility for loan forgiveness.

23. Under the First Draw program, lenders were compensated by the federal government via processing fees based on the balance of the financing outstanding at the time of final disbursement, in the following amounts:

- Five (5) percent for loans of not more than \$350,000;
- Three (3) percent for loans of more than \$350,000 and less than \$2,000,000; and
- One (1) percent for loans of at least \$2,000,000.

24. Borrowers had to submit documentation necessary to establish eligibility such as payroll processor records, payroll tax filings, form 1099s, income and expenses documentation.

25. In general, the maximum amount borrowers could borrow was calculated by aggregating payroll costs from the previous year, with annual employee salaries capped at \$100,000. The borrower then calculated the

average monthly payroll cost and multiplied that amount by a factor of 2.5.

26. The Economic Aid Act (P.L. 116-260, in the Consolidated Appropriations Act of 2021), authorized and funded a Second Draw PPP Loan program.

27. For Second Draw PPP Loans, lenders were compensated by the federal government via processing fees based on the balance of the financing outstanding at the time of final disbursement, in the amount of five (5) percent for loans of more than \$50,000 and not more than \$350,000, and in the amount of three (3) percent for loans above \$350,000.

28. Each borrower certified on the First and Second Draw loan applications that they were eligible to receive the loans under the program guidelines and that their applications and supporting documentation were accurate.

29. Borrowers were later able to seek forgiveness of the loans if the funds were used for eligible payroll costs, payments on business mortgage interest payments, rent, or utilities during either the 8- or 24-week period after disbursement.

INELIGIBILITY UNDER AFFILIATION RULES

30. Action Enterprise Holdings was approved for a First Draw PPP loan of \$10,000,000 on April 15, 2020 by Regions Bank. It reported 499 jobs. It listed NAICS code 484220 (Specialized Freight Trucking) on its PPP loan application. The entire loan amount, plus interest, was forgiven for a total of

\$10,124,658.

31. Action Enterprise Holdings was approved for a Second Draw PPP loan of \$2,000,000 on Feb. 9, 2021 by Regions Bank. It reported 299 jobs. The entire loan amount, plus interest, was forgiven for a total of \$2,026,521.

32. Upon information and belief, Action Enterprise Holdings was just a holding company with few, if any, employees. Accordingly, the loan applications were likely submitted on behalf of one or more of its subsidiaries.

33. Under the PPP loan requirements, the Action Entities are affiliated under the ownership and/or management tests. Thus, their collective employees, revenues, profits, and assets should have been included in any calculations when determining whether Action Enterprise Holdings was eligible for a PPP loan.

34. Had they been, Action Enterprise Holdings would not have been eligible for Second Draw funding, and it may not have been eligible for First Draw funding as well.

A. The Affiliation Rules

35. A business was eligible for a First Draw PPP Loan if the business had 500 or fewer employees, the business met the SBA employee-based or revenue-based size standard for the industry in which it operates (if applicable), or the business was eligible under the SBA's alternative size standard, which requires that the companies' maximum tangible net worth is

not more than \$15 million; and average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million.

36. A business was eligible for a Second Draw PPP Loan if the business had 300 or fewer employees or met another limited exception.

37. When multiple entities are operated under common ownership or management, the SBA generally applies “affiliation rules” that require the various entities to consolidate their employee and revenue count when evaluating their loan eligibility. Their purpose is to capture exactly the situation we appear to have with the Action Entities, where a single entity owns and/or controls multiple companies.

38. Under the SBA’s PPP Affiliation Rules: “Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.”

39. The Action Entities are affiliated under the ownership and/or management tests.

Ownership

40. The “affiliation based on ownership” test states that:

For determining affiliation based on equity ownership, a concern

is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50 percent of the concern's voting equity. If no individual, concern, or entity is found to control, SBA will deem the Board of Directors or President or Chief Executive Officer (CEO) (or other officers, managing members, or partners who control the management of the concern) to be in control of the concern.

41. Action Enterprise Holdings is the ultimate owner for each of the Action Entities. It is the direct owner of Action Resources and ARI Logistics, and it is the indirect owner of Action Environmental and Action Dedicated.

42. Action Enterprise Holdings also files annual Form 5500s with the federal government reporting a single-employer 401(k) plan called the “Action Resources, Inc. 401(k) Plan.”¹ In order to be a single employer plan, the entities must have 80% common ownership and be considered a “controlled group” under ERISA rules. 26 U.S.C. § 1563. Otherwise, if entities outside the control group participated in the plan, then it would be a multiemployer plan. This means that any entities participating in these plans must be affiliated by ownership.

Management

43. The “affiliation based on management” test states that:

Affiliation arises where the CEO or President of the applicant concern (or other officers, managing members, or partners who control the management of the concern) also controls the management of one or more other concerns. Affiliation also arises where a single individual, concern, or entity that controls the

¹ Action Resources, Inc. converted to Action Resources, LLC in 2017.

Board of Directors or management of one concern also controls the Board of Directors or management of one [or] more other concerns. Affiliation also arises where a single individual, concern or entity controls the management of the applicant concern through a management agreement.

44. Action Enterprise Holdings has always portrayed itself as a single entity with common management. Its website explains that Action Enterprise “delivers specialized transportation solutions including bulk chemical and hazardous waste transportation, dedicated transportation, brokerage and logistics services as well as industrial cleaning and field environmental services.”

45. The company’s website lists the three remaining divisions—Action Resources, Action Environmental, and Action Enterprise Logistics—under “who we are” with a common “leadership team” helmed by CEO Staci Pierce.

46. Upon information and belief, Pierce and the rest of the leadership team for Action Enterprise Holdings have control of the management of its subsidiaries.

B. Affiliation Rule Waiver Requirements

47. To avoid application of the affiliation rules, the Action Entities would have to meet one of three affiliation rule waiver requirements.

48. The affiliation rules are waived under the PPP program for any of the following three reasons: (1) any business concern with less than 500 employees that, as of the date on which the loan is funded, is assigned a

North American Industry Classification System (NAICS) code beginning with the digits 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the U.S. SBA; and (3) any business concern that “receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958,” *i.e.*, a “small business investment company.” “Financial assistance” includes any type of financing listed in 13 C.F.R. § 107.50, including loans and equity.

49. At least two of the three waivers to the affiliation rules do not apply: none of the Action Entities are assigned a NAICS code beginning with 72, nor have any of these entities been assigned a franchise identifier code.

50. As for the third waiver, K3 Analytics has not found any evidence that any of the Action Entities received any SBIC lending.

C. Application of the Affiliation Rules

Employment Test

51. Action’s website presently states that the “Action family employs over a thousand industry professionals.”

52. A 2014 AL.com article about Action Resources stated that the company employed 1,100 people.

53. Action Enterprise Holdings claimed 499 jobs on its First Draw loan application and 299 jobs on its Second Draw loan application, just one employee below the maximum for each.

54. These employee counts suggest one of two scenarios. First, it is possible that Action Enterprise Holdings is the actual employer of its subsidiaries' employees, and so no affiliation analysis is even required. Second, it is possible that Action Enterprise Holdings is just a holding company with no actual employees of its own, and that it applied for the loan on behalf of its many subsidiaries.

55. Regardless, upon information and belief, the job counts on the different loan applications were deflated from the Action Entities' actual headcounts.

56. For example, Action Enterprise Holdings' Form 5500s state that its 401(k) plan had 683 active participants at the start of 2019 and 603 active participants at the end of 2019; 639 active participants at the start of 2020 and 419 active participants at the end of 2020; and 449 active participants at the start of 2021 and 474 active participants at the end of 2021.

57. An "active participant" in a 401(k) plan is generally a current employee of the company. Moreover, it is likely that not every employee participated in the 401(k) plan. In addition to voluntary opt-outs, the plan was only available for employees who had completed six months of service.

58. Further, the Commercial Carrier Journal publishes an annual CCJ Top 250 List of the largest carriers in the trucking industry. The 2019 and 2020 Lists indicated that Action Enterprise Holdings had 490 company equipment drivers in 2019 (counted separate from its independent contractor drivers)

and 400 company drivers in 2020. These employee numbers do not include administrative staff or any other non-driver employees the company employs.

59. Another example, Action Resources submitted an MCS-150 to the U.S. Department of Transportation in January 2019 that reported employing 432 drivers and an MCS-150 in April 2020 that reported employing 440 drivers.

60. Stone Trucking Southwest, LLC d/b/a Stone Trucking Company submitted an MCS-150 on June 29, 2019 stating that the company had 73 drivers. On that same date, STI Trucking LLC submitted an MCS-150 stating that it had 96 drivers.

61. It is possible that Action Enterprise Holdings listed only 499 employees on its First Draw application because it was claiming to have qualified for PPP funding under a different standard, but the Second Draw loan application required applicants to report “Number of Employees (including affiliates, if applicable; may not exceed 300 unless “per location” exception applies).” There was no other standard of applicable exception that would permit Action Enterprise Holdings to deflate its actual employee count to under 300 employees.

62. Regardless, upon information and belief, Action Enterprise Holdings did not qualify for First Draw or Second Draw funding under the employee count test.

Revenue Test

63. NAICS code 484220 had a revenue size standard of \$30 million.
64. The CCJ Top 250 Lists for 2020 and 2019 stated that Action Enterprise Holdings had more than \$283 million in revenues in 2019, \$291 million in revenues in 2018, and \$271 million in revenues in 2017.
65. Accordingly, upon information and belief, Action Enterprise Holdings did not qualify for First Draw funding under the revenue standard.

Alternative Size Standard

66. Upon information and belief, Action Enterprise Holdings did not qualify for First Draw funding under the SBA's alternative size standard, which requires that the companies' maximum tangible net worth is not more than \$15 million; and average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million.
67. The SBA generally defines "tangible net worth" as "total net worth minus goodwill," meaning that intangible assets other than goodwill are not subtracted from the "total net worth calculation."²
68. Upon information and belief, based on its assets, Action Enterprise

² For example, in the SBA's "Size Status Declaration" (SBA Form 480), the SBA defines "tangible net worth" as "total net worth minus goodwill" (https://www.sba.gov/sites/default/files/files/SBA_480_4.pdf) instead of the Generally Accepted Accounting Principles (GAAP) definition of this term, which is total net worth minus all intangibles. Although this form is used for the SBIC program, both the SBIC and PPP loans are administered by the SBA and feature alternative size standards.

Holdings had a net worth exceeding \$15 million at the time of the PPP loans. For example, the CCJ Top 250 List for 2019 states that Action Enterprise Holdings owned 1,773 trailers and 242 tractors (counted separately from the leased vehicles).

FALSE CERTIFICATIONS

69. Version one of the PPP Borrower Application Form, effective April 2, 2020, required the applicant to certify in good faith that, *inter alia*:

- 1) The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- 2) The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees [sic] or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- 3) I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

70. The Second Draw PPP Loan Application had similar language, except

that it required the Applicant to certify that it, “together with its affiliates (if applicable)... employs no more than 300 employees.”

71. Action Enterprise Holdings had to make these certifications when applying for PPP funding.

72. Some or all of the above PPP certifications were false when made by Action Enterprise Holdings because it applied for and received PPP loans it was not eligible to receive because of its size.

CONCLUSION

73. Action Enterprise Holdings should be required to repay PPP loans and interest that was forgiven by the federal government, plus processing fees and penalties, for those loan amounts to which it was not entitled to receive.

COUNT I **VIOLATIONS OF 31 U.S.C. § 3729** **FALSE CLAIMS ACT**

74. Relator hereby incorporates and realleges all other paragraphs as if fully set forth herein.

75. As set forth above, Defendant knowingly presented or caused to be presented false or fraudulent claims for payment or approval, in violation of 31 U.S.C. § 3729(a)(1)(A).

76. As set forth above, Defendant knowingly made, used, or caused to be made or used, false records or statements material to numerous false claims, in violation of the False Claims Act, 31 U.S.C. § 3729(a)(1)(B).

77. Due to Defendant's conduct, the United States Government has suffered substantial monetary damages and is entitled to recover treble damages and a civil penalty for each false claim, record, or statement. 31 U.S.C. § 3729.

78. Relator is entitled to reasonable attorneys' fees, costs, and expenses. 31 U.S.C. § 3730(d)(1).

PRAYER FOR RELIEF

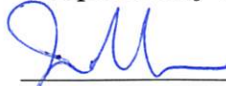
WHEREFORE, Relator prays for judgment against Defendant:

- (a) awarding the United States treble damages sustained by it for each of the false claims;
- (b) awarding the United States a maximum civil penalty for each of the false claims and statements;
- (c) awarding Relator the maximum relator's share of the proceeds of this action and any alternate remedy or the settlement of any such claim;
- (d) awarding Relator litigation costs and reasonable attorneys' fees and expenses; and
- (e) granting such other relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Relator hereby respectfully demands trial by jury on all issues and counts triable as of right before a jury.

Respectfully submitted,



Jason Marcus

Georgia Bar No. 949698

Bracker & Marcus LLC

3355 Lenox Road, Suite 660

Atlanta, Georgia 30326

Telephone: (770) 988-5035

Facsimile: (678) 648-5544

Jason@fcacounsel.com